
Chicago City vs. Robbins.

mere conjecture, and to introduce parol testimony as to value to justify a departure from it. A Court may look beyond the face of the will where there is an ambiguity as to the person or property to which it is applicable, but no case can be found where such testimony has been introduced to enlarge or diminish the estate devised.

We are of opinion, therefore, that Benjamin L. Benson took an estate in fee in both the messuages described in the will.

The judgment of the Circuit Court is therefore affirmed with costs.

CHICAGO CITY *vs.* ROBBINS.

1. A municipal corporation, having the exclusive care and control of the streets, is obliged to see that they are kept safe for the passage of persons and property, and to abate all nuisances that might prove dangerous; if this duty be neglected, and in consequence thereof, any one is injured, the corporation will be liable for the damages sustained.
2. The corporation, has, however, a remedy over against a private party who has so used the streets as to produce the injury, unless the corporation concurred in the wrong.
3. A private party is concluded by a judgment recovered against a corporation for his act or negligence, if he knew that the suit was pending and could have defended it.
4. An express notice to such party to defend the suit, is not necessary to create his liability.
5. But in an action brought by a corporation, against such party, to recover back the damages it has been compelled to pay for his assumed neglect, it is competent for the defendant to show that he was under no obligation to keep the street in safe condition, and that it was not through his default that the accident happened.
6. In such case, if it appears that there was fault both on the part of the corporation and defendant, the former cannot recover

Chicago City vs. Robbins.

for the reason that one of two joint wrong-doers cannot have contribution from the other.

7. If a nuisance necessarily occurs in the ordinary mode of doing work, the occupant or owner is liable, but if it happened by the negligence of the contractor or his servants, the contractor alone is responsible.
8. Where rules of property in a state are fully settled by a series of adjudications, this Court adopts the decisions of the State Courts.
9. But where private rights are to be determined by the application of common law rules alone, this Court, although entertaining for State tribunals the highest respect, does not feel bound by their decisions.

This was a writ of error to the Circuit Court of the United States for the Northern District of Illinois.

Mr. Anthony, of Illinois, for Plaintiff in Error.

Mr. Fuller, of Illinois, *Contra*.

Mr. Justice DAVIS. This is an action on the case brought by the City of Chicago against Robbins. The suit was originally commenced in the Cook County Court of Common Pleas, one of the State Courts of Illinois. It was transferred, in pursuance of the act of Congress, on the petition of Robbins that he was a citizen of New York, to the Circuit Court of the United States for the Northern District of Illinois, where there was a trial by jury on the 10th day of April, 1860, on the plea of not guilty, and the issue found for Robbins. There was a motion for a new trial, which was overruled by the Court, and on the 28th day of May, 1860, judgment was entered on the verdict of the jury. The decision of Circuit Courts on motion for new trials is not subject to review, and this case is here on exceptions taken to the charge of the Judge to the jury.

The declaration alleges: That the plaintiff is a corporation by the laws of Illinois, having exclusive control over the public streets, and bound to protect them from incroachment and injury.

Chicago City vs. Robbins.

That Robbins was the owner of a lot on one of the public streets, and wrongfully excavated in the sidewalk next to and adjoining his lot, an area of great length, width, and depth, and wrongfully suffered the same to remain uncovered and unguarded, so that one William H. Woodbury, on the night of the 28th of December, 1856, while exercising reasonable care and prudence in passing along the street, fell into it and was greatly injured. That Woodbury brought suit against the City, in said Cook County Court of Common Pleas, and at the June Term, 1857, of the said Court recovered a judgment for \$15,000 and costs, which the City has been forced to pay, and that although the City is primarily liable, yet Robbins is responsible over to it for the amount of judgment, interest and costs so recovered. The case as shown by the bill of exceptions is *this*: Robbins, owning a lot in Chicago, on the southeast corner of Wells and South Water streets, on the 20th of February, 1856, contracted in writing with Peter Button to erect a building thereon, which included an excavation of the sidewalk next to and adjoining it, so as to furnish light and air to the basement. The contract contained a stipulation that Button was to be liable for any violation of City ordinances in obstructing streets and sidewalks, or accidents resulting from the same. Possession of the ground in order to erect the building, was given to Button, by the terms of the contract, on the 1st day of April, 1856. The area was dug early in the spring and covered up temporarily with joists, which often got displaced, and during the summer and fall it was frequently uncovered and dangerous. The flagging was laid some time in the fall and the iron gratings afterwards, with which Button had nothing to do.

There were seven different contractors on the building, in all, on different parts of the work. Letts had the contract for the iron gratings, and Cook & Co. for the flagging. Robbins was in Chicago, and occasionally at the building during the summer, and was there while excavations were going on, and was spoken to frequently by the City Superintendent upon the dangerous condition of the area. At one time after the flagging was laid, and ice was or had been on the flagging, he called Robbins'

Chicago City vs. Robbins.

attention to the condition of the area, and suggested the mode in which it should be covered up, "telling him that if it was sleety and people were passing rapidly they might slip in, and that somebody's neck would be broken, if the covering was not attended to," and he replied "that he would see to it, but that the matter was in the hands of his contractor, and he would speak to him about it." Before this, the head clerk in the office of the City Superintendent wrote Robbins a note and put it in the post-office, notifying him of the danger of the whole front of the sidewalk. The area was usually entirely open after flagging was laid, until after the grating was all done, and was open until after the accident. There were lamps at bridges, and a lamp at alley, sixty-four feet from the building. The width of sidewalk including area, was sixteen feet. The area was four feet ten inches wide. The grade of Wells street was changed by the corporation; the sidewalk was raised eight inches higher than it was, to accommodate it to the grade of the street; it was raised in July or August 1856, and Robbins directed Van Osdell, his architect, to raise the sidewalk to the grade. Van Osdell superintended the erection of the building for Robbins, who paid him; his duty as superintendent was to see that the work was done according to contract; to see "that the work and material were according to specification, and make estimates." Button was told of the dangerous condition of the area, and spoke several times to his foreman about it. Button was to furnish his work under the contract by the 1st of September, but did not in fact complete it until February, 1857. On the night of the 26th of December, 1856, the area was not sufficiently covered, and Woodbury fell into it and was injured, and sued the City and recovered in manner as stated in the declaration. Marsh was City attorney in 1856, and when the suit was begun, he made preparations for its defence, and ascertaining that Robbins owned the building applied to him to assist him in procuring testimony. Robbins told him of a witness who knew something of the suit, and promised to write to him, and afterwards informed Marsh that he had done so. The evening before the trial he casually met Robbins and told him that the suit would be tried the next

Chicago City vs. Robbins.

day; he did not go expressly to notify him to defend the suit, and never notified him that the City would look to him for indemnity. Evidence was given tending to show that the City authorities knew of the excavation of this area, and of other areas similar to this at different times, and interposed no objection, though no express permission to make this one was given.

The defendant introduced in evidence the following provision of the Ordinances of the City of Chicago, viz.:

"ARTICLE II—OBSTRUCTIONS. CHAPTER LIII., SECTION 1.

"Be it ordained by the Common Council of the City of Chicago, That no porch, galley, stoop, steps, cellar door, stair railing, or platform, erected or to be erected within the city, shall be allowed to extend into or upon any sidewalk where the street is less than seventy feet in width, more than four feet; nor more than five feet, where the street is seventy feet and upwards in width. Any violation hereof shall subject the offender to a penalty of twenty-five dollars, and to the like penalty for every day such violation shall continue, after notice from the Marshal or Street Commissioner of the proper Division to remove the same."

It also appeared in evidence, that the original ordinance from which the foregoing provision is taken, was passed May 3d, 1855, but, as then passed, did not allow of more than four feet encroachment upon the sidewalk in any case. On the 7th of February, 1856, the ordinance was amended by the City Council to read as above.

Is Robbins, under the law and evidence, answerable over to the city for the judgment recovered by Woodbury?

It is well settled that a municipal corporation having the exclusive care and control of the streets, is obliged to see that they are kept safe for the passage of persons and property, and to abate all nuisances that might prove dangerous; and if this plain duty is neglected, and any one is injured, it is liable for the damages sustained. The corporation has, however, a remedy over against the party that is in fault, and has so used the streets as to produce the injury, unless it was also a wrong doer. If it

Chicago City vs. Robbins.

was through the fault of Robbins that Woodbury was injured, he is concluded by the judgment recovered, if he knew that the suit was pending and could have defended it.

An express notice to him to defend the suit was not necessary in order to charge his liability. *Barney vs. Dewey*, (13 John., p. 226); *Warner vs. McGany*, (4 Vt., 500); *Beers vs. Pinney*, (12 Wend., 809).

He knew that the case was in Court; was told of the day of trial; was applied to to assist in procuring testimony; and wrote to a witness, and is as much chargeable with notice as if he had been directly told that he could contest Woodbury's right to recover, and that the city would look to him for indemnity.

Robbins is not, however, estopped from showing that he was under no obligation to keep the street in a safe condition, and that it was not through his fault the accident happened. It is insisted, that inasmuch as Robbins had no express permission from the City to encroach on the street, that he was engaged in an unlawful work, and the digging of the area was in itself a nuisance. So far as the City impliedly could give authority to make this area, it was given; the corporation undoubtedly knew that this area was in process of construction, and that many similar ones had been built since the grade of the City was raised, and yet no objection was ever interposed. Areas, like the one in controversy, are convenient to the owners of adjoining buildings, and useful in affording light and air, and if during their construction they are properly guarded and protected, they are no essential hindrance to the public in their right of transit over the streets. The public have a right to the free passage of the streets, and yet that right cannot always be enjoyed. Improvements could not be made in a large City; houses could not be built, or repaired even, without the streets being at some time obstructed. In *Commonwealth vs. Passmore*, (1 Serg. & Rawle., 217,) the Supreme Court of Pennsylvania say: "It is true that necessity justifies actions which would otherwise be nuisances. It is true also that this necessity need not be absolute, it is enough if it be reasonable. No man has a right to throw wood or stones into the street at pleasure. But inasmuch

Chicago City vs. Robbins.

as fuel is necessary, a man may throw wood into the street for the purpose of having it carried to his house, and it may lie there a reasonable time. So, because building is necessary, stones, brick, lime, sand, and other materials may be placed in the street, provided it be done in the most convenient manner.' " But these encroachments on a street must be reasonable, not continued longer than is necessary, and must be properly guarded and protected so as to secure the public against danger, and if these things do not concur, then they become nuisances and can be abated." *Clark vs. Fry*, (8 Ohio State Reports, 359).

Was the building of this area a necessary encroachment on the street; and if so, were the proper steps taken to secure it so as to protect the public from injury? The fact that an improvement may become dangerous, and involve great hazard, is no argument against the propriety of making it. If by great care, and more than ordinary diligence, it can be made, and the public saved from harm, and it is also necessary, then the right to make it is solved. The grade of the City was doubtless raised to secure light and air to basements, to get good cellars, and for purposes of drainage. The value of property in a City is much enhanced by the erection of solid and durable buildings, and every proper facility to perfect them should be given to builders. If it is necessary, in order to make a better building to occupy the sidewalk and dig an area, and it can be occupied, and the area dug and secured without danger to the public, then the encroachment made on the street is reasonable, and the work lawful. But in every improvement like the one we are considering, it is essential that every possible precaution should be used against danger. No precaution whatever was used in this case. The area was left uncovered, without guards and lights to warn those who passed by, and a serious accident was the result. If an area is left open it is dangerous, and is a nuisance, and can be abated. *Dygett vs. Schenck*, (23 Wend., 446); *Congreve vs. Morgan & Smith*, (18 N. Y., 84); *Storrs vs. City of Utica*, (17 N. Y., 108); *Coupland vs. Hardingham*, (3 Campbell, 398).

The City must be reimbursed unless it has been itself in fault. The rule of law is, that one of two joint wrong doers cannot have

Chicago City vs. Robbins.

contribution from the other. It is difficult in this case to see how the City was to blame, and least of all how Robbins can impute blame to it. Robbins desired to erect a large storehouse, and to add to its convenience, wished to excavate the earth in the sidewalk in front of his lot. Without express permission from the city, but under an implied license, he makes the area. No license can be presumed from the City to leave the area open and unguarded even for a single night. The privilege extended to Robbins was for his benefit alone, and the city derived no advantage from it, except incidentally. Robbins impliedly agreed with the City, that if he was permitted to dig the area, for his own benefit, that he would do it in such a manner as to save the public from danger, and the City from harm. And he cannot now say that true it is you gave me permission to make the area, but you neglected your duty in not directing me how to make it, and in not protecting it when in a dangerous condition. If this should be the law, there would be an end to all liability over to municipal corporations, and their rights would have to be determined by a different rule of decision from the rights of private persons. Because the City is liable primarily to a sufferer by the insecure state of the streets, offers no reason why the person who permits or continues a nuisance at or near his premises should not pay the City for his wrongful act. The City gave no permission to Robbins to create a nuisance. It gave him permission to do a lawful and necessary work for his own convenience and benefit, and if, in the progress of the work, its original character was lost, and it became unlawful, the City is not in fault. We can see no justice or propriety in the rule, that would hold the City under obligation to supervise the building of an area such as this.

But the defendant maintains "that the owner of a lot who employs a competent and skilful contractor (exercising an independent employment) to erect a building on his lot, is not liable to third persons for injuries happening to them by reason of the negligence of such contractor in the prosecution of the work," and that this area was not such a nuisance as rendered him liable. How far owners of real estate, or personal property,

Chicago City vs. Robbins.

are answerable for injuries which arise in carrying into execution that which they have employed others to do, has been a subject much discussed in England and this country since the case of *Bush vs. Steinman*, 1 Bos. & Pul., 404. All the cases recognize fully the liability of the principal where the relation of master and servant, or principal and agent exists; but there is a conflict of authority in fixing the proper degree of responsibility where an independent contractor intervenes. We are not disposed to question the correctness of the rule contended for by the defendant as an abstract proposition. The rule itself has, however, limitations and exceptions, and we cannot see that it is applicable to this case.

"If the owner of real estate suffer a nuisance to be created, or continued, by another on or adjacent to his premises, in a prosecution of a business for his benefit, when he has the power to prevent or abate the nuisance, he is liable for an injury resulting therefrom to third persons." *Clark vs. Fry*, (8 Ohio State Rep., 359); *Ellis vs. Sheffield Gas Consumers' Co.*, (2 Ellis & Black, 75 Eng. C. L., p. 767).

This area when it was begun was a lawful work, and if properly cared for, it would always have been lawful; but it was suffered to remain uncovered, and thereby became a nuisance, and the owner of the lot, for whose benefit it is made, is responsible. He cannot escape liability by letting work out like this to a contractor, and shift responsibility on to him if an accident occurs. He cannot even refrain from directing his contractor in the execution of the work so as to avoid making the nuisance. A hole cannot be dug in the sidewalk of a large City and left without guards and lights at night, without great danger to life and limb, and he who orders it dug, and makes no provision for its safety, is chargeable, if injury is suffered.

It is said that Robbins did not reserve control over the mode and manner of doing the work, and is not therefore liable; but the digging this area necessarily resulted in a nuisance—was the result of the work itself—unless due care was taken to make the area safe.

This is a clear case of "doing unlawfully what might be done

Chicago City vs. Robbins.

lawfully; digging earth in a street without taking proper steps for protecting from injury." *Newton vs. Ellis*, (85 Ellis & Black, 58 Eng. C. L., 123).

"If the owner of real estate builds an area in front of his store, he must at his peril see that the street is as safe as if the area had not been built." *Congreve vs. Morgan & Smith*, (18 N. Y., 84).

The privilege of making the area was a special favor conceded to Robbins alone, as the owner of the lot, and "it is a familiar principle that when one enjoys a privilege in consideration that he alone can enjoy the benefit, he is required to use extraordinary care in the exercise of that privilege." *Nelson vs. Godfrey*, (12 Illinois, 20).

Robbins, in the exercise of his privilege, did not use even ordinary care. There is no provision in his contract with Button, nor with the men who laid the flagging, or put on the iron grating, that they should provide proper lights and guards. What Button failed to do, by which he is chargeable with negligence, does not appear in the evidence. And Robbins, although repeatedly warned, and having daily supervision over the work by his architect and superintendent, suffers this nuisance to be continued. A case of grosser negligence could hardly be imagined. In the heart of a large City, the owner of a valuable lot, being desirous of adding to the value of a large iron building that he is about to erect by the license (to be inferred, not expressed,) of the corporation, digs an area; leaves it open, without guards or lights; fails to provide with his contractor for the very matter which, if left undone, would make it a nuisance; is told of the dangerous condition of the area; has a direct supervision over it by his superintendent, and yet, when an injury is suffered by the very nuisance which he has created for his own benefit, and continued, insists that he is not in fault; that if blame attaches anywhere, it is to his contractor. If the owner of fixed property is not responsible in such a case as this, it would be difficult ever to charge him with responsibility.

In the cases which were cited by the defendant's counsel, and relied on, was the case of *Hilliard vs. Richardson*, (3 Gray, 349),

Chicago City vs. Robbins.

and the case of *Scammon et al. vs. The City of Chicago*, (25th Ills., 424).

Hilliard vs. Richardson was a most elaborate and able discussion of the *respondeat superior*, and the authorities in this country and England were fully reviewed, and we see no reason to question the conclusion at which the Court arrived. But that case and the one at bar were not at all alike. That was a case where the owner of a building contracted with a carpenter at an agreed sum to repair it, and a teamster, who was employed by the carpenter to haul boards, left them in the street in front of the lot and an accident happened. The teamster, when he placed boards in the street, was engaged in a work collateral to that which the owner contracted for—the repair of the building—and in no sense can the injury be said to happen from the doing of that defectively which the owner directed to be done. The owner was correctly not held liable, and one of the grounds on which that Court place their decision was, “that it was not a nuisance erected by the owner of the land, or by his license, to the injury of another.”

The case of *Scammon vs. The City of Chicago*, is similar in many of its facts to this case, and is decided differently. That Court held, as we do, that if the “nuisance necessarily occurs in the ordinary mode of doing the work, the occupant or owner is liable; but if it is from the negligence of the contractor or his servants, then he should alone be responsible.” But the Court also held that “the omission to cover the opening in the area did not necessarily occur as an incident to the prosecution of the work,” a rule to which we cannot assent, and which we think is opposed by reason and authority.

It was urged at the bar that this Court, in such cases, follows the decision of the local Courts.

Where rules of property in a State are fully settled by a series of adjudications, this Court adopts the decisions of the State Courts.

But where private rights are to be determined by the application of common law rules alone, this Court, although entertain

Chicago City vs. Robbins.

ing for State tribunals the highest respect, does not feel bound by their decisions.

Testing the question of the correctness of the charge of the Judge of the Circuit Court to the jury, by the rules and principles we have discussed and established, was there or not error in it?

The following language was used by the Judge in his charge, and was excepted to by the City: "If, then, the contractors were in possession and control of the premises, with their servants and agents, and were, in their employment, independent of the defendant at the time of the accident, and the defendant was not concerned personally in the negligence which caused it, it follows, from what has been said, that he could not be held responsible for it." This instruction, in a case where the facts warranted, might have been properly given. But it did not arise out of the facts of this case; was inapplicable to them; was calculated to confuse and mislead the jury on the question of Robbins' liability; and must have misled them, and should not have been given.

A broad rule was laid down, when the very case itself furnished an exception.

Robbins' duty was absolute to see that the area, dug under his direction and for his benefit, should be safely and securely guarded, and failing to do so, his liability attached, and the jury should have been told so.

The City also excepted to so much of the said charge of the Court, as leaves the question of joint negligence on the part of the plaintiff and defendant to the jury.

The City was not in fault, and this exception was properly taken.

The judgment below is reversed, with instructions to award a *venire de novo*.